Roger Williams University Law Review

Volume 10 | Issue 3 Article 6

Spring 2005

Protecting the Integrity of the Rhode Island Judicial System and Assuring an Adequate Remedy for Victims of Spoliation: Why An Independent Cause of Action for the Spoliation of Evidence Is the Solution

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"New and nameless torts are being recognized constantly . . . ."[1]

I. INTRODUCTION

Imagine the following situation: An individual driving a rental car is involved in a head-on collision with another vehicle. The collision leaves the driver of the rental car severely and permanently injured. The injured driver contends that the vehicle's design, manufacturing, or maintenance defects caused his injuries. The injured driver asserts that the engine of the rental car intruded into the passenger compartment of the car at the point of impact causing the severe and permanent injuries. Upon the request of the injured driver's attorney, the rental company takes possession of the vehicle and agrees to hold the car for inspection for a certain time period. Before that time period expires, however, the wrecked vehicle is sold for scrap, the front of the car is severed and the engine is removed. According to the opinion of an accident reconstruction expert, the destruction of the vehicle has made it impossible to determine whether a defect in the vehicle was the proximate cause of the injuries suffered by the driver.

This scenario is an example of spoliation of evidence and the effects such behavior can have on an individual's ability to prove a

1. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3 (4th ed. 1971).

civil claim. Courts have traditionally tried to remedy this problem by relying on the two civil doctrines of adverse inferences and civil discovery sanctions.[2] However, in a case based on the same facts described above, the District of Columbia Court of Appeals held that such circumstances called for an expansion of tort liability and recognized an independent cause of action for the spoliation of evidence.[3] This Comment will elucidate why the D.C. Court of Appeals was correct in accepting such a cause of action and why Rhode Island would be well-served by doing the same..

In general terms, the phrase "spoliation of evidence" has been defined as "the destruction, alteration, or mutilation of evidence especially by a party for whom the evidence is damaging"; any activity that renders evidence permanently unavailable to the judicial process; the failure to preserve property for the use as evidence.[4] Spoliation is truly a nondiscriminatory offense capable of multiple permutations that affects the interests of not only parties involved in litigation, but third parties as well. Spoliation can be intentional or negligent, made in good faith or bad, carried out during litigation or while there is potential for litigation, and can be discovered prior to, during or even after a suit has been decided.[5]

Because "relevant evidence is critical to the search for the truth. . .[and] there can be no truth, fairness, or justice in a civil action where relevant evidence has been destroyed before trial,"[6] the absolute integrity of the judicial system is threatened when those harmed by spoliation do not receive adequate redress. While courts have cautiously started to divert away from traditional remedies and have begun to recognize an independent tort for spoliation of evidence,[7] Rhode Island continues to rely on the tradi-

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2. Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087-99 (1987).

3. *See* Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998).

4. MERRIAM-WEBSTER'S DICTIONARY OF LAW 465 (1996); *see also* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 1.1, at 4 (1989).

5. *See* Robert J. Wegener, *Ethical Issues in the Practice of Product Distribution and Marketing Law: Destruction of Evidence and Secret Recordings*, ALI-ABA COURSE OF STUDY MATERIALS, PRODUCT DISTRIBUTION AND MARKETING (March 2004).

6. Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999).

7. Bart S. Wilhoit, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 647 (1998).

tional remedies when spoliation arises in the civil context. In Rhode Island, these remedies (primarily civil sanctions and adverse inferences) while traditional, often inadequately compensate the victim, and are not applicable in many situations where spoliation of evidence occurs.[8] Furthermore, the failures of the traditional remedies tarnish the integrity of the judicial system by hampering the tryers of fact from accurate fact finding, and offer little deterrence for future spoliators.

This comment addresses spoliation of evidence in the civil context,[9] and advocates that Rhode Island courts recognize an independent cause of action for such conduct when the existing remedies do not provide adequate redress for those injured. Part II highlights the prolific nature and problematic effects of spoliation in civil matters in general. Part III examines the current position of an independent tort for spoliation of evidence in Rhode Island, and any indications that the state courts may or may not be moving towards the recognition of a separate cause of action. Part IV provides a description of the traditional remedies for spoliation in civil matters, which includes adverse inference jury instructions and civil and criminal sanctions. This section also addresses how these traditional remedies are applied in Rhode Island. Following presentation of the traditional remedies, Part V exposes the inadequacies of such remedies in their ability to properly address the harms posed by spoliation in civil litigation. Part VI analyzes how recognition of these shortcomings has resulted in the crafting of an independent cause of action. As this comment illustrates, the independent cause of action has been fashioned in a variety of configurations depending on the particular jurisdiction. Part VI concludes with a recommended independent cause of action that the Rhode Island courts ought to recognize to maintain their integrity in providing adequate redress for those injured by the tortious conduct of others. The Comment concludes that it is inevitable

8. The adverse inference does not act as a substitute for an essential element of a claim. A victim of spoliation cannot rely on the adverse inference as required evidence to support their claim. Moreover, the adverse inference, as well as civil sanctions cannot be used in cases that involve third-party spoliators. *Id.* at 648.

9. While spoliation is certainly a concern for parties in criminal cases, this comment focuses on civil actions where the duties of the private parties are not as clearly established as those involving the government.

that additional cases will come before the state courts where the traditional remedies will fail to adequately compensate the victim, and therefore, the only viable solution to such problems is to recognize an independent tort for spoliation.

II. A GENERAL OVERVIEW OF SPOLIATION OF EVIDENCE IN THE CIVIL CONTEXT

Spoliation of evidence can create a number of problems for the parties involved in civil litigation.[10] It is important to recognize though that spoliation of evidence is not a party exclusive issue; the topic is relevant to both plaintiffs and defendants.[11] Crucial physical evidence that has been lost, destroyed, or suppressed can have a significant negative effect on both parties on how a legal argument is presented and supported in civil litigation.[12] For the plaintiff, the absence of such relevant evidence can hinder the ability to properly prove its claim. On the other hand, if the plaintiff is the party who commits spoliation, the defendant may feel that his ability and opportunity to present a valid defense had been interfered with.[13] Also, the absence of pivotal physical evidence may also "inhibit the timely settlement of the matter by the parties."[14] Finally, as a last concern, the ability to achieve the two most important goals of the judicial system, truth and fairness, are impeded by the destruction of evidence.[15] Restricting the spoliation of evidence is therefore justified because such conduct lessens the probability that the judicial process will reach fair and accurate results.[16]

Spoliation of evidence in civil actions results from varying levels of conduct, ranging from negligent to intentional, and can

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10. Kathleen L. Daeer-Bannon, Esq., *Cause of Action for Spoliation of Evidence*, CAUSES OF ACTION SECOND SERIES 249 (West 2002). The doctrine of spoliation of evidence has grown out of a recognition that a plaintiff has a legally protected interest in a civil suit, and this interest can be harmed by spoliation.

11. Joseph J. Ortego & Glen M. Vogel, *Spoliation of Evidence*, PRODUCTS LIABILITY, ALI-ABA COURSE OF STUDY MATERIALS (2000).

12. Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation As a Separate Tort*, 30 IDAHO L. REV. 37, 38 (1993).

13. *Id.*

14. *Id.*

15. Solum & Marzen, *supra* note 2, at 1138.

16. *Id.*

involve not only the immediate parties involved in the underlying litigation, but also third parties not involved in the primary civil suit. Because of the variety of forms of spoliation, a number of remedies have been fashioned by the courts to protect a plaintiff's interest, as well as the interest of the judicial system as a whole. Increasingly, state courts are being faced with the decision whether to expand on the traditional remedies by recognizing an independent cause of action for spoliation of evidence.

The first attempt to prevent spoliation of evidence by the judiciary was first recorded in 1722, in the case of *Armory v. Delamirie.*[17] The doctrine of spoliation was recorded for the first time in this case, where the court allowed the plaintiff to bring an action in trover against a jeweler who had spoliated a jewel.[18] The remedy applied by the judge was an instruction to the jury that unless the defendant produced the jewel and was able to prove its low quality, the jury was to presume the jewel was of the finest quality and damages should be determined accordingly. [19] The common law spoliation doctrine established by *Armory*, remained the standard used by English and American courts for over one hundred years.[20] Thus, the adverse jury instruction became the most commonly used remedy in spoliation of evidence matters.

As claims of spoliation in civil matters rise, it is necessary to examine if the traditional, common remedies, such as the adverse instruction are still adequate to provide redress to the victim, and deter the potential spoliator. Today, in a legal environment that can fairly be described as "win at all cost," claims of spoliation "tend to permeate the prosecution of civil matters."[21] A survey by Harvard Law Professor Charles R. Nesson, concluded that half of all litigators described problems with the spoliation of evidence as "frequent" or "regular."[22] When discussing the rampant character of spoliation in civil matters, "[i]t would be difficult to exaggerate

17. 93 Eng. Rep. 664 (K.B. 1722).
18. *Id.*
19. *Id.*
20. *See* Wilhoit, *supra* note 7, at 638.
21. Spencer, *supra* note 12, at 38-39.
22. *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991). There is an "overwhelming" incentive to suppress or destroy evidence because the adverse party is unlikely to discover the destroyed evidence, or the act of destroying the evidence itself. *Id.* at 795.

the pervasiveness of evasive practices" carried out by individuals who possess physical evidence.[23] Traditionally, the courts have attempted to deal with the problem of spoliation in civil matters[24] in a variety of ways, including jury instructions, criminal and civil discovery sanctions, exclusion of evidence, and default judgments.[25] However, these traditional remedies do not provide adequate relief in all circumstances, and therefore it is time for Rhode Island to recognize an independent tort action for spoliation of evidence in the civil context.

III. CURRENT POSITION ON AN INDEPENDENT TORT FOR SPOLIATION OF EVIDENCE IN RHODE ISLAND

In *Malinowski v. Documented Vehicle/Drivers Systems, Inc.*,[26] the United States Court of Appeals for the First Circuit stated that, "[n]either the Rhode Island legislature nor the Rhode Island Supreme Court has yet established or recognized the existence of an independent tort for the spoliation of evidence."[27] The court further announced, "[w]hile both the magistrate judge and the district court judge concluded that the Rhode Island Supreme Court would not create such a tort, we see no need to delve into uncharted waters of Rhode Island law and endeavor to prophesize whether the Rhode Island Supreme Court would adopt an independent tort for spoliation of evidence."[28] Because this is the most relevant case involving an independent cause of action in Rhode Island, it requires further analysis.

The litigation that spawned *Malinowski* began in 1993 as a wrongful death action brought in Rhode Island state court by a mother whose son who was killed in a horrific accident.[29] After a

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23. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 829.

24. The scope of this comment is limited to spoliation in the civil context.

25. *See* Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV. 1003, 1005 (1998).

26. Malinowski v. Documented Vehicle/Drivers Sys., Inc., 66 Fed. Appx. 216 (1st Cir. 2003). While this case is an "unpublished opinion" and subject to limitations as to citation and precedential value, the Author references the case merely to reflect the First Circuit's current perspective on spoliation in Rhode Island courts.

27. *Id.* at 222.

28. *Id.*

29. *Id.* at 217-19 (discussing the procedural history of the plaintiff's state court proceedings).

second jury returned a verdict for the defendants, the Rhode Island Supreme Court agreed to hear the plaintiff's appeal.[30] On appeal, the plaintiff argued, *inter alia*, that the trial justice erred by failing to issue an adverse inference jury instruction on the doctrine of spoliation.[31] However, because the issue on appeal was only the trial justice's discretion in not offering the adverse inference instruction, the court did not address the possibility of a new independent cause of action to provide a remedy for the plaintiff. Following the dismissal of her appeal by the Rhode Island Supreme Court, the plaintiff brought an independent tort action in the Rhode Island state court claiming that the condition of the tachograph apparatus was "the cause of her inability to obtain a favorable verdict in the wrongful death suit."[32] It was essentially the claim of Ms. Malinowski that had the device not been "destroyed," it would have shown that the driver of the trailer was traveling at an excessive speed at the time her son was struck and killed.[33] The defendants removed the action to federal court, and immediately filed motions for summary judgment, arguing that Rhode Island did not recognize an independent cause of action for spoliation of evidence.[34]

A federal magistrate judge granted summary judgment for the defendants and noted that the Rhode Island Supreme Court had not recognized a separate and independent tort for spolia-

30. Malinowski v. United Parcel Serv., 792 A.2d 50, 52 (R.I. 2002). In 1991, the fourteen-year-old son of the plaintiff was killed after being struck by a tractor-trailer driven by an employee of the defendant, United Parcel Service. *Id.* Two years later, the plaintiff filed a wrongful death action; the trial resulted in a verdict for the defendants. *Id.* On appeal, the Rhode Island Supreme Court held that an improper instruction warranted a new trial. *Id.* Following the second trial, the jury again returned a verdict for the defendants; the trial justice denied the plaintiff's motions for judgment as a matter of law, and for a new trial. *Id.* at 53.

31. *Id.* at 54. The plaintiff argued that the defendant had tampered with the tachograph apparatus (a recording device placed in commercial vehicles that records the movement and speed of the vehicle) in the truck that struck her son such that "certain mechanisms necessary to establish the tachograph evidence were destroyed while in the possession of [the defendant]." *Id.* The trial justice refused to issue the spoliation instruction because "there was no explicit request made as to what evidence was the subject of an argument regarding spoliation." *Id.*

32. *Malinowski*, 66 Fed. Appx. at 221.

33. *Id.*

34. *Id.*

tion.[35] Furthermore, the magistrate stated that it was *unlikely* Rhode Island would do so given the problems the tort would create and the fact that the majority of "the states' highest courts considering the issue have declined to adopt a separate and independent cause of action for spoliation of evidence."[36] The magistrate further held that even if Rhode Island had recognized the tort, the plaintiff had failed to provide evidence that would establish the required elements in her case.[37] In addressing the magistrate's decision, the First Circuit explained that because the tachographic disc was not destroyed, mutilated, or significantly altered, but rather was merely discolored and in "poor condition," such was not sufficient to make out a spoliation tort.[38] Because of this, the magistrate concluded that Ms. Malinowski had failed to demonstrate that the condition of the evidence was the cause of her inability to obtain a favorable verdict.[39] Additionally, the First Circuit's evaluation of the magistrate's report and recommendation appears to require a plaintiff to prove the reason why the evidence is in such poor condition before such a condition can rise to the level of spoliation.[40]

Ms. Manilowski objected to the report and recommendation, however, the district court agreed with the magistrate's prophetic conclusion that Rhode Island would not recognize the independent cause of action for spoliation of evidence.[41] The district court concluded that even if the tort were recognized and available as a cause of action, the Rhode Island Supreme Court's decision in the plaintiff's wrongful death claim, regarding the lack of materiality of the "newly discovered" evidence of spoliation, had the effect of eliminating an essential element of such a tort claim.[42] In other

35. *Id.*

36. *See id.* (quoting Malinowski v. United Postal Serv., Inc. , C.A. 01-273ML, report and recommendation, at 9 (D.R.I. May 10, 2002).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id* at 222. "Moreover, in the absence of evidence why the disc was in poor condition, there was insufficient proof that defendants had intended to damage the disc." *Id* at 221.

41. *Id* at 221.

42. *Id.* The determination by the Rhode Island Supreme Court was that the "newly discovered" evidence regarding potential spoliation of the disc "was not material enough to affect the outcome of the trial." Malinowski v. United Parcel Serv., 792 A.2d 50, 55, 57 (2002).

words, even if there had been spoliation, it would not have affected the outcome of the plaintiff's wrongful death claim. The district court then entered judgment as a matter of law in favor of the defendants.[43] The district court accepted the magistrate's report and recommendation, and entered judgment as a matter of law in favor of the defendants.[44] On appeal to the First Circuit, the court agreed with the conclusions of both the magistrate and the district court, and concluded that there was no recognizable tort in Rhode Island, and even if there were, Ms. Malinowski had failed to satisfy the necessary elements.[45]

Therefore, presently, an independent tort for spoliation has not been recognized in Rhode Island. There is also speculation from the federal courts that the Rhode Island Supreme Court would not recognize such an independent tort. It has also been speculated by those same federal courts, however, that there are some elements to such causes of action that may exist, yet were not met in the case. Does this indicate that an independent tort for spoliation of evidence is an available remedy, but that the appropriate fact pattern, with the proper elements has not reached the Rhode Island courts? Furthermore, if Rhode Island does not recognize an independent tort claim for spoliation, what recourse is available to parties who are victims of spoliation of evidence?

IV. THE TRADITIONAL REMEDIES FOR SPOLIATION OF EVIDENCE IN CIVIL MATTERS AND HOW THEY HAVE BEEN APPLIED BY THE RHODE ISLAND JUDICIARY

When litigants turn to the courts for adjudication of their grievances, the courts must protect the rights of the parties, including the right to a fair hearing that makes use of all the available relevant evidence. The courts have adopted different methods to protect innocent parties from spoliation of evidence, but the remedies established have only been mildly successful at best.[46] The remedies or sanctions for spoliation "range from a slap on the wrist to the severe."[47] However, the basis behind all types of

43. *See Malinowski*, 66 Fed. Appx. at 221.
44. *Id.*
45. *Id.* at 222.
46. *See* Spencer, *supra* note 12, at 40.
47. Wegener, *supra* note 5.

remedies for spoliation, whether lenient or serve are based on two established public policy rationales: redress and deterrence.[48]

The policy of redress, or compensation, encompasses the idea that a prejudiced party ought to be restored to the position they would have occupied had the spoliation not occurred.[49] Concurrently, deterring others from committing a similar wrongful act is the punitive rationale that provides the other basis for remedy.[50] Amongst these two theories though, the driving force in spoliation matters has been to compensate the victim for the adverse impact the missing evidence has on his or her underlying case.[51] Rather than the mere punishment of the spoliator, courts have found that the more important considerations in selecting a remedy or sanction are the degree of prejudice caused by the loss, and what remedy will lessen the impact on that party.[52]

From the time of the King's Bench decision in *Armory*, courts have relied on a balancing test to determine the appropriate remedy and the severity of the sanction to redress situations where spoliation has occurred.[53] Factors analyzed in the balancing test include:

> (1) the degree of fault of the party who spoliated the evidence; (2) the degree of prejudice suffered by the opposing party; (3) the availability of a lesser sanction that will avoid substantial unfairness to the opposing party; and (4) the potential of the sanction deterring such conduct by others.[54]

Over time though, courts have generally been in agreement that the determination of whether or not to impose sanctions, and if so, which type, is influenced predominantly by two of these factors.[55] The two most important factors that "have taken on greater importance in most cases on sanctions for spoliation [are]: (1) the

48. *See* Rivlin, *supra* note 25, at 1009.
49. *Id.*
50. *Id.*
51. *See* Wegner, *supra* note 5.
52. *See id.*
53. Brooks Morel, *Now You See It, Now You Don't: A Georgia Perspective on Spoliation of Evidence*, 17 GA. ST. U. L. REV. 1163, 1173 (2001).
54. Rivlin, *supra* note 25, at 1006.
55. MARGARET M. KOESEL ET AL., SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 33 (2000).

culpability of the offender, or the alleged mental state which gives rise to the destruction of evidence, and (2) the degree of prejudice or harm which resulted from the actions of the offender."[56] When these factors are balanced and the court determines that a remedy is required, remedies can be awarded in various forms, including adverse inference jury instructions and other civil sanctions as the most common result. Unfortunately, despite the balancing test which examines the harm spoliation causes to parties in litigation, an independent claim in tort is rarely allowed, and instead the court relies on the traditional remedies to compensate those who have suffered from the spoliation.

A. *The Adverse Inference*[57]

The adverse inference jury instruction is the most prevalent remedy for the spoliation of evidence.[58] When a court employs the adverse inference, the jury is instructed that it *may* infer from the fact that the evidence is missing or altered, that the evidence would have been unfavorable to the party responsible for the spoliation.[59] The legendary jurist, Judge Learned Hand articulated the rationale behind the adverse inference when he said, "When a party is once found to be fabricating, or suppressing, documents, the natural, indeed, the inevitable, conclusion is that he has something to conceal, and is conscious of guilt."[60] Here then, it is the culpability of the alleged spoliator which provides the justification for the adverse inference.

While the adverse inference is widely used, many courts apply it only when certain conditions are met. For example, some courts will not give the instruction without a showing of bad faith or intentional behavior.[61] Other courts permit the instruction by a

56. *Id.* (quoting Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 102 (D. Colo. 1996)) (internal quotations omitted). Koesel goes on to discuss these two factors in greater detail. *See generally id.* at 33- 35.

57. Courts have articulated that the underlying rationales for the adverse inference are remediation, deterrence, and punishment. *Id.* at 36.

58. Morel, *supra* note 53, at 1174.

59. *Id.*

60. Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir.), *modified*, 103 F.2d 430 (2d Cir. 1939).

61. Rivlin, *supra* note 25, at 1009. In Connecticut, the trier of fact must be satisfied that four factors are proven before an adverse inference may be drawn against the spoliator. *See* Beers v. Bayliner Marine Corp., 675 A.2d

showing of mere negligence on the part of the spoliator.[62] Overall, the burden typically falls on the spoliator to prove the evidence was not unfavorable to his case.[63] However, even when the initial burden has been established and the adverse inference is permitted, because of the fact that the inference is permissive, rather than mandatory, this most common remedy cannot always provide redress for those affected by the spoliation of evidence.

Despite this troubling characteristic, the adverse jury instruction is often the remedy employed in Rhode Island for issues of spoliation of evidence. The Rhode Island Supreme Court first addressed the doctrine of spoliation in *Rhode Island Hosp. Trust Nat'l. Bank v. Eastern Gen. Contractors, Inc.*[64] There, the plaintiff bank moved to exclude evidence regarding a telephone conversation between the bank and a representative of the defendant, which allegedly had been recorded by the plaintiff but was no longer in existence.[65] The court held that the defendant was entitled to present evidence to the jury that a recording did exist before it was destroyed by the bank.[66] The court went on to hold that under the spoliation doctrine, the deliberate or negligent destruction of relevant evidence by a party may give rise to an inference that the destroyed evidence would have been unfavorable to the offending party.[67] Furthermore, the court held that a showing of bad faith on the part of the spoliator, while may perhaps strengthen the inference, is not necessary to permit such an inference.[68] Without deciding whether in the particular case the adverse inference would be permitted, the court opined that the doctrine of spoliation "supports [the] conclusion that, at the very

829, 832-33 (Conn. 1996). The factors are: (1) the spoliation must be intentional; (2) the evidence must be relevant to the issue for which the party seeks the inference; (3) the non-spoliator must have acted with due diligence with respect to the evidence in question; and (4) the trier of fact must be instructed that it is not required to make the adverse inference, unless the previous three factors are satisfied. *Id.*

62. Morel, *supra* note 53, at 1174.

63. *Id.* at 1174-75.

64. 674 A.2d 1227, 1234 (R.I. 1996).

65. *See id.* at 1234.

66. *Id.* The court cited several decisions by different Courts of Appeals that had relied on the doctrine *omnia praesumuntur contra spoliatiorem* ("all things are presumed against a despoiler") in making similar decisions. *Id.*

67. *Id.*

68. *Id.*

least, such evidence should not have been withheld from the jury."[69] Since then, as is the case in the majority of jurisdictions, Rhode Island courts rely on the adverse inference[70] as the most called upon remedy for spoliation in civil actions.

Since the Supreme Court of Rhode Island first articulated the spoliation doctrine in the civil context in *Eastern General*, the necessary conditions under which the adverse instruction will be given has undergone an evolution. Over time though, the principle has become well-established that "the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to

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69. *Id.*

70. The Model Civil Jury Instructions for Rhode Island provides a model instruction for the spoliation or destruction of Evidence:

> During this trial you have heard testimony that one of the parties destroyed/mutilated evidence. When evidence is destroyed we call it "spoliation" of that evidence. Under certain circumstances the spoliation of evidence may give rise to an averse inference that the destroyed/mutilated evidence would have been unfavorable to the position of the party who destroyed/mutilated it.
>
> Spoliation of evidence may be innocent or intentional, or somewhere between the two. It is the unexplained and deliberate destruction/mutilation of relevant evidence that gives rise to an inference that the thing destroyed/mutilated would have been unfavorable to the position of the spoliator. If you find that [party A] destroyed/mutilated [identify of evidence at issue] and did so deliberately then you are permitted to infer that the jury's consideration of that evidence would have been unfavorable to [party A]'s position in this case.
>
> In deciding whether the destruction/mutilation of [identify evidence at issue] was deliberate you may consider all of the facts and circumstances which were proved at trial and which are pertinent to that item of evidence. You may consider who destroyed it, how it was destroyed, the legitimacy or lack of legitimacy in the reasons given for its destruction, the timing of the destruction, whether the individual destroying the evidence knew the evidence might be supportive of the opposing party, whether the spoliation was intended to deprive the court of evidence, and any other facts and circumstances which you find to be true. You may also consider the extent to which it has been shown that the spoliated evidence would, indeed, have been unfavorable to [party A]'s position. If the spoliation of the evidence is attributable to carelessness or negligence on the part of the spoliator you may consider whether the carelessness or negligence was so gross as to amount to a deliberate act of spoliation.

MODEL CIVIL JURY INSTRUCTIONS FOR RHODE ISLAND § 402.3 (Rhode Island Bar Ass'n. 2003).

that party."[71] When the instruction is given, the jury is instructed that "such an adverse inference is *permissible*, but not mandatory."[72] Similarly, the court has held that the inference derived from the doctrine of spoliation is not only permissive, but that if the inference is to be drawn, it is not to be considered conclusive.[73] Further, the instruction does not automatically follow from a party's blanket suggestion that evidence was destroyed. A trial judge is given discretion to refuse to give the instruction when "there [is] no explicit request made as to what evidence was subject of an argument regarding spoliation."[74] A trial judge is not obligated to issue the requested adverse inference instruction if the party seeking the inference merely implies that the other party mishandled a piece of evidence, without presenting any further evidence or explanation.[75] To meet the evidentiary standard for the instruction, the party requesting the instruction must offer evidence that the un-produced evidence was either relevant or that it was deliberately destroyed.[76] Note that this is an "or" test and that if the evidence is relevant, that is often enough.

When a party raises the issue of spoliation by an opposing party and presents evidence to support such a claim, the party alleged to have destroyed the evidence may not shift the burden back to the party who raised the issue by arguing that the complaining party has failed to prove that the evidence was in fact destroyed.[77] When a defendant argues that their conduct does not rise to the level of spoliation deserving of the adverse instruction, the Rhode Island Supreme Court has required a satisfactory ex-

71. Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000); *see, e.g.*, Kurczy v. St. Joseph Veterans Ass'n, 820 A.2d 929, 946 (R.I. 2003) (quoting *Tancrelle*, 756 A.2d at 748); State v. Barnes, 777 A.2d 140, 145 (R.I. 2001) (quoting *Tancrelle*, 756 A.2d at 748).

72. Farrell v. Connett Trailer Sales, Inc., 727 A.2d 183, 188 (R.I. 1999) (emphasis added).

73. *Tancrelle*, 756 A.2d at 749 (citing N.H. Ins. Co. v. Rouselle, 723 A.2d 111, 114 (R.I. 1999)).

74. Malinowski v. United Parcel Serv., 729 A.2d 50, 54 (R.I. 2002) (quoting the trial judge from the trial court proceedings) (internal quotations omitted).

75. *Id.* at 55.

76. *See Tancrelle*, 756 A.2d at 748 (noting that the Court has held that "although a showing of bad faith may strengthen the inference of spoliation, such a showing is not essential." (citing *Farrell*, 727 A.2d at 186)).

77. Mead v. Papa Razzi Restaurant, 840 A.2d 1103, 1108, (R.I. 2004).

planation of why evidence might be missing.[78] The court has stated that it will "decline to allow defendant[s] to benefit from [their] own unexplained failure to preserve and produce responsive and relevant information during discovery."[79]

B. *Civil and Criminal Sanctions*

In addition to the adverse jury instructions, courts have also attempted to apply civil and criminal sanctions against spoliators through their sanctioning powers that are rooted in the rules of civil procedure as well as in the inherent powers of the court.[80] The sanctions often include issue preclusion, dismissal, summary judgment, default judgment, or the exclusion of expert testimony or other evidence.[81] Courts have also relied on their inherent powers to sanction pre-litigation spoliators.[82] "Thus, once a victim brings the underlying claim to court, the court has inherent power to sanction the defendant spoliator for the defendant's action prior to trial."[83] Because spoliation of evidence inhibits a trial court's ability and necessity to hear evidence and determine facts accurately, both state and federal courts have recognized this inherent power as necessary to ensure the proper administration of justice.[84] The force and finality of these civil sanctions vary greatly however, depending on the court's evaluation of a number of factors such as: (1) the culpability of the spoliator, (2) the amount of prejudice to the nonoffending party, (3) the degree of interference with the judicial process, (4) the likelihood that lesser sanctions

78. *See id.*

79. Kurczy v. St. Joseph Veterans Ass'n., 820 A.2d 929, 947 (R.I. 2003) (holding spoliation instructions appropriate in light of defendant's failure to produce board meeting minutes for meeting where accident may have been discussed); *see also Mead*, 840 A.2d at 1108 (holding that after testimony revealed that defendants systematically prepared and retained incident reports, without a satisfactory explanation that such report never existed, the jury should be permitted to draw an inference that production of such a report would be adverse to their cause).

80. Morel, *supra* note 53, at 1175. The destruction or concealment of evidence in civil matters is not specifically prohibited by any federal statute, and many states do not have substantive law concerning spoliation. Spencer, *supra* note 12, at 41.

81. Morel, *supra* note 53, at 1175.

82. *Id.*

83. Wilhoit, *supra* note 7, at 649.

84. *See* KOESEL ET AL., *supra* note 55, at 30.

would provide a remedy and deter future acts of spoliation, (5) whether the evidence in question has been permanently lost; and (6) whether the sanctions will unfairly punish a party for misconduct on the part of the lawyer.[85]

Issue preclusion and dismissal with prejudice are two civil sanctions that have been applied in both negligent and intentional spoliation situations.[86] Because the effects of these sanctions are so powerful though, whenever possible, courts choose to apply lesser sanctions instead of these more fatal sanctions.[87] When a dismissal with prejudice is actually granted against the plaintiff, any evidence discovered after the dismissal is moot, even if the evidence was significant and may have helped establish a prima facie case.[88] While summary judgment or dismissal are the most potent sanctions against a plaintiff in spoliation situations, a default judgment is the "ultimate sanction against a defendant under Rule 37."[89] Because these remedies are so severe and final, and because courts have a strong desire that cases be decided on the merits, dismissal and default judgments are rarely used.[90] In

85. *See id.* at 32-33. Courts have generally agreed that the two most important factors to be considered are (1) the culpability of the spoliator, or the mental state that gave rise to the spoliation, and (2) the amount of prejudice or injury which resulted from the conduct of the spoliator. *Id.* at 33.

86. *See* Morel, *supra* note 53, at 1175-76. One form of issue preclusion is the exclusion of expert testimony. At least one court has reasoned that public policy demands that "an expert should not be permitted to intentionally or negligently destroy . . . evidence, and then to substitute his or her own description of it." Nally v. Volkswagen, 539 N.E.2d 1017, 1021 (Mass. 1989).

87. *See* Morel, *supra* note 53, at 1176. While many courts prefer to apply the sanction of summary judgment instead of dismissal, the result is usually the same, "a victory for the aggrieved party." *Id.* (citing Rivlin, *supra* note 25, at 1012).

88. *See* Rivlin, *supra* note 25, at 1011. There are several factors a court may consider when determining whether the appropriate sanction in a particular case is that of dismissal: (1) the degree of willfulness of the offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction; (3) the severity a dismissal relative to the severity of the abuse; (4) whether any evidence has been irreparably lost; (5) the policy favoring adjudication on the merits of the claim; (6) whether the sanction will operate unfairly by penalizing a party for the misconduct of the attorney; and (7) the need to deter the parties and future litigants from similar abuses. *Id.*

89. Morel, *supra* note 53, at 1176.

90. KOESEL ET AL., *supra* note 55, at 45. "[D]efault judgment is the most severe sanction a court can impose on a defendant and is proper only in those cases where actions of a party showed deliberate, contumacious, or unwarranted disregard for the court's authority." *In re* Marriage of Lai, 625 N.E.2d

extreme cases, however, especially where a party demonstrates either bad-faith by the spoliator, or where the prejudice is so severe that these extreme remedies are the only ones that will effectively redress the harm, courts are willing to impose such sanctions.[91]

Civil sanctions imposed in pending litigation are not the only available remedies. In addition to the sanctions previously mentioned, a number of states have established statutes which impose criminal sanctions for the spoliation of evidence when such action reaches the level of obstruction of justice.[92] It has been suggested, however, that because most spoliation is only considered a misdemeanor, courts are unlikely to prosecute individuals under such statutes.[93] Furthermore, because one would only be punished for a misdemeanor, the potential for deterrence is low. "When faced with the choice between committing the minor crime of destroying evidence to cover up for a more serious offense or to protect [one]self from a large civil monetary judgment, a spoliator would chose to commit the spoliation and face a minor criminal sanction."[94]

When examining the sanctions, it must be remembered that litigants are not the only persons subject to the court's sanctions, as attorneys may also be subject to court sanctions and discipline for either the actual spoliation of evidence, or assisting in such conduct.[95] According to the Model Rule of Professional Conduct 3.4, "[a] lawyer shall not . . . alter, destroy or conceal a document or other material having potential evidentiary value," "falsify evidence," or assist in such acts.[96] In order to prohibit lawyers from actively participating in or knowingly allowing the spoliation of potentially relevant evidence to occur, many states have adopted a

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330, 334 (Ill. App. Ct. 1993).

91. *See* KOESEL ET AL., *supra* note 55, at 45.

92. Morel, *supra* note 53, at 1177.

93. *Id.* Additionally, with the criminal justice system so immersed in major felony cases, the dockets do not allow for the prosecution of spoliation cases. *Id.* at 1177-78.

94. Rivlin, *supra* note 25, at 1017. The federal obstruction of justice statute, which is a felony, has been applied in the context of spoliation of evidence as well. *See* Wegener, *supra* note 5, at 3 (discussing a case in federal district court where the Department of Justice filed a single felony count against a company, alleging obstruction of justice, after the company had allegedly destroyed documents related to an investigation by the Department).

95. Morel, *supra* note 53, at 1178.

96. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2003).

similar rule.[97] In these jurisdictions, an attorney who violates such a rule may be subject to fines, suspension, or liability for malpractice.[98]

The current civil and evidentiary sanctions imposed for the spoliation of evidence in the Rhode Island courts are not unlike those discussed above, with some minor alterations and distinctions. For example, similar to Federal Rule of Civil Procedure 37, Rhode Island Superior Court Rule of Civil Procedure 37(b) permits a court to "make such orders and enter such judgment in regard to the failure or refusal [to provide discovery] as are just."[99] The available sanctions under Rule 37(b) include dismissal or default judgment, the striking of pleadings or portions of pleadings, and the refusal of allowing the offending party to support or oppose certain claims or defenses.[100] Rule 37 (b) has been presumed to be applicable when a party has failed to produce evidence due to the fact that it has been destroyed or disposed of.[101]

The type of conduct required for a specific sanction, however, has not always been clear. In *Sampson v. Marshall Brass Co.*,[102] the Rhode Island Supreme Court stated that "it appears uncertain whether Rule 37 (b) (2) permits dismissal with prejudice of a party's action for spoliation of evidence in circumstances in which the inability to produce the requested evidence for discovery is not the result of any willful or intentional conduct on the part of the litigant."[103] Addressing the wide range of culpability that potentially could be involved in spoliation, the court observed that "'[d]estruction of potentially relevant evidence obviously occurs along a continuum of fault – ranging from innocence through the degrees of negligence to intentional[ly].'"[104] In determining the appropriate sanction for the spoliation of relevant evidence, the Rhode Island Supreme Court has condoned the use of five accepted factors: (1) whether the defendant was prejudiced; (2)

97. Morel, *supra* note 53, at 1178.
98. *Id.*
99. R.I. SUPER. CT. R. CIV. P. 37(b).
100. *Id.*
101. *See* Sampson v. Marshall Brass Co., 661 A.2d 971 (R.I. 1995).
102. *Id.*
103. *Id.* at 971.
104. Rhode Island Hosp. Trust Nat'l Bank v. Eastern Gen. Contractors, Inc., 674 A.2d 1227, 1234 (R.I. 1996) (quoting Welsh v. United States, 884 F.2d 1239, 1246 (6th Cir. 1988)).

whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the spoliator acted in good or bad faith; and (5) the potential for abuse if the evidence is not excluded.[105] However, courts have later held that simply taking into account these five factors is not enough; rather they must be applied and connected to the sanction in an appropriate manner.

Farrell v. Connetti Trailer Sales, Inc.,[106] is a further example of how the trial court's discretion, in deciding which sanction to apply, has been refined. In *Farrell*, the court held that even though the trial judge appropriately considered the five factors listed above before determining the applicable sanction for spoliation of evidence, the judge had abused his discretion in selecting a suitable remedy.[107] There, spoliation of a key piece of evidence – a mobile home– resulted in the exclusion of relevant evidence and a dismissal of the plaintiff's suit.[108] Owners of a mobile home had sued the manufacturers of the vehicle for damages allegedly caused by defective repairs.[109] The owners had the bank repossess the mobile home before they sued the defendants, and therefore, the defendants were unable to inspect the mobile home after the suit was filed to determine if the repairs were in fact defective.[110] The trial judge precluded the owners from introducing any evidence concerning the condition of the mobile home after the defendants performed the initial repairs, and without this evidence, the court dismissed the plaintiff's claim.[111] On appeal, the Rhode Island Supreme Court held that excluding all the plaintiff's evidence related to the post-defendant-repairs was unwarranted because the defendants failed to introduce any evidence of "bad faith or willful destruction of this evidence."[112] The case was remanded with the instruction that the spoliation sanction be limited to the adverse inference.[113] Due to the potential harshness and finality of many civil sanctions, the Rhode Island Supreme Court seemed to be suggesting that the trial courts should impose the least damag-

105. Farrell v. Connetti Trailer Sales, Inc., 727 A.2d 183, 187 (R.I. 1999).
106. *Id.*
107. *Id.*
108. *Id.* at 184.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 187.
113. *Id.* at 188.

ing sanction that will eliminate the prejudice to the non-spoliating party.[114] In other words, this case could potentially stand for the proposition that without a showing of willful destruction, victims of spoliation of evidence will be limited to the remedy of an adverse jury instruction.

While it does make available the adverse jury instruction, as well as other procedural remedies, Rhode Island does not have a statute that recognizes destruction of evidence in a civil action as a crime.[115] Therefore, unlike other jurisdictions with such statutes, and where deterrence is a likely result, Rhode Island is void of any potential deterrence that would emanate from such a statute. Rhode Island does offer some protection in that a lawyer is forbidden from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or assisting another to do so under Rhode Island Rule of Professional Conduct 3.4.[116] While this ethical rule may provide some deterrence for lawyers, it is completely ineffective in deterring an individual who is not subject to the Rules of Conduct.

V. INADEQUACIES OF TRADITIONAL REMEDIES

As it has been mentioned, and will be further discussed below, the traditional spoliation remedies are laden with problems. For example, under the rules of civil procedure, the courts are limited in exercising their sanctioning authority. One particular limit that hiders effectual sanctioning of spoliation is Rule 37 of the Federal Rules of Civil Procedure which states, "a party only can be sanctioned for direct violations of a court order or a discovery request."[117] What this means is that any spoliation that occurs prior to litigation is not subject to Rule 37. An unfortunate result of this limitation is that a party may be encouraged to destroy evidence prior to the commencement of litigation or discovery.[118] Further-

114. *See* KOESEL ET AL., *supra* note 55, at 151.

115. Rhode Island does have a statute that prohibits the obstruction of justice, R.I. G. L. § 11-32-1, *et. seq.*, however, the statute does not address the destruction, tampering, or manipulating of evidence in civil actions.

116. R.I. ST. S. CT. art. V. R. P. C. Rule 3.4 (2005).

117. Wilhoit, *supra* note 7, at 649; *see also* FED. R. CIV. P. 37. Because many states have adopted rules of procedure similar to the Federal Rules, the language attaches not only to federal courts, but to a majority of state courts as well.

118. KOESEL ET AL., *supra* note 55, at 29.

more, more general problems with the traditional remedies for spoliation include (1) the remedies are not severe enough to truly deter potential spoliators; (2) the remedies are designed to be used during a trial and not after[119]; (3) the remedies are virtually ineffective when the spoliation is carried out by a nonparty; and (4) the remedies do not properly compensate the litigant who has been harmed by the spoliation and who usually bears the financial burden of discovering the spoliation.[120] These problems are not going away, and while the problems may certainly be worse without the use of the current remedies, that does not preclude the adoption of more effective means for dealing with the problem.

Because of the inadequacies of the traditional remedies, Justice Oliver Wendell Holmes postulated that individuals actually have an incentive to spoliate.[121] Holmes wrote that the law must be viewed from the perspective of the "bad man" who takes action only after calculating the risks against the advantages of his behavior.[122] As a "pure cost-benefit calculator, the bad man will commit the tort or crime if the expected gain exceeds the expected loss."[123] The traditional remedies to spoliation imposed both in Rhode Island and many other jurisdictions are ravaged with weaknesses. Thus after calculating the risks of harm to potential advantages, the "bad man's" calculation will often lead to an result that will favor the destruction of evidence.[124] The risk of being caught is low, and even if caught, the penalties are so lenient that compared to the significant potential for large benefits from spoliating evidence, (such as avoiding liability where the potential monetary damages are enormous, and punishment is minimal) the bad man will opt for the withholding or destruction of evidence.[125]

One of the most obvious shortcomings of the traditional spoliation remedies becomes apparent when spoliation is committed by a nonparty. Under the traditional remedies, a judge can only

119. If spoliation is discovered more than one year after final judgment, the court is unable to apply the traditional remedies in an attempt to redress the victim. *See* Rivlin, *supra* note 25, at 1015.

120. *Id.* at 1013.

121. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

122. *See id.*

123. *See* Nesson, *supra* note 22, at 795.

124. *Id.*

125. Rivlin, *supra* note 25, at 1013-14.

hold a party responsible for spoliation if that party is before the court.[126] If a nonparty has negligently or intentionally spoliated evidence, the party who is "responsible" for the nonparty is charged, rather than the nonparty itself.[127] The problem with this remedy is that the wrong party is punished; one party is held responsible for the actions of another. Because the court has a limited authority under the procedural rules, all the traditional remedies must be connected to the underlying lawsuit.[128] This posses the biggest threat to injured parties who have suffered harm at the hands of a third party.

Rhode Island has an interest in providing adequate relief to those who are harmed as a result of the wrongdoing of another. When the right to present relevant evidence in a civil matter is hampered by the acts, either intentional or negligent, of another, the deprived party may be unable to prove their claim. The most commonly used remedy for spoliation in Rhode Island is the adverse inference, and this instruction does not adequately protect the deprived party. The inference is permissive and is not to be conclusive so thus, the parties may not necessarily be able to present as strong a case as they would have, had the spoliation not occurred. While remedies are available which have a greater deterrence to them and are more likely to assure proper redress for the harmed party, such as a default judgment, the Rhode Island courts are reluctant to impose such measures. The result is that, absent a showing of "willfulness" on the part of the spoliator, a party who claims to have been harmed by the destruction of evidence is left with essentially one remedy, the adverse inference jury instruction. The remedy is subject to several limitations which leave the remedy entirely ineffective in many situations. To ensure the integrity of the Rhode Island judicial system whereby a party will feel that he or she has adequate protection from the injuries of spoliation, additional remedies must be recognized. An independent cause of action for the spoliation of evidence is such a remedy.

126. *Id.* at 1016.
127. *Id.*
128. *Id.* at 1014.

VI. CRAFTING AN INDEPENDENT CAUSE OF ACTION FOR SPOLIATION OF EVIDENCE

As the tort of spoliation emerges and develops, courts are providing policy reasons that support adoption of the tort. Such reasons include: (1) an independent tort action promotes the desire to "protect testimonial candor, liberal discovery and the integrity of the adversarial system"; (2) the cause of action protects the "probable expectation" of a favorable judgment or defense in pending or future litigation; and (3) the traditional remedies and court imposed sanctions are not effective enough or even available to deter the spoliation of evidence.[129] Furthermore, the policy reasons for adopting the independent tort have also been described in terms of rules of equity.[130] The tort is justified based on the rule of equity favoring redress for every wrong, and the rule of equity that prohibits an individual from profiting from his own wrong actions.[131] There is no question that independent causes of action for spoliation may pose some challenges and perhaps some strains on the system, however, none of the challenges are reason alone to accept the status quo and ignore the existing inadequacies with the traditionally imposed remedies. It has been argued there are "common sense" alternatives to the tort of spoliation,[132] however, the common sense alternatives offer little more than the traditional remedies and leave the independent tort the only viable alternative for courts to properly resolve the inadequacies of the current system.

In *Smith v. Superior Court*,[133] the California Court of Appeals became the first state appellate court to recognize an independent tort for the spoliation of evidence.[134] In recognizing the tort , the court stated that "[n]ew and nameless torts are being recognized

129. Ortego & Vogel, *supra* note 11.
130. *See* Morel, *supra* note 53, at 1182-83.
131. *See id.*
132. *See* Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. R. 441 (2001). In suggesting that Wisconsin ought not adopt any such tort, the comment acknowledges that the traditional remedies – inferences, sanctions, and criminal prosecution- have "their own unique problems that demand attention and reform." *Id.* at 443.
133. 198 Cal. Rptr. 829, 832 (Cal. Ct. App. 1984), *overruled by* Cedars-Sinia Med. Ctr. v. Super. Ct., 954 P.2d 511 (Cal. 1998).
134. *See* Smith, 198 Cal. Rptr. at 832.

constantly, and the progress of the common law is marked by many cases of first impression."[135] The court noted that "probable expectancies" are a large part of what is important and valuable in modern life, and courts must do more to "discover, define and protect them from undue interference."[136] In justifying the tort, the court analogized intentional spoliation to the preexisting tort of intentional interference with a perspective business advantage.[137] The court reasoned that a prospective civil action in a product liability case is a valuable "probable expectancy," not unlike that implicated in the existing tortious interference action.[138] From there, the court held that an interference with such a "probable expectancy" ought to be protected by the court.[139]

A. *Recognized Causes of Action*

While almost every jurisdiction makes available the traditional sanctions for the spoliation of evidence, some states have taken steps to develop independent causes of action for spoliation.[140] At last count, at least twelve jurisdictions have decided to recognize such an independent cause of action in one form or another.[141] Among these jurisdictions, the tort is often distinguished

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135. *Id.* at 832 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3 (4th ed. 1971)). The entire quote reads:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The intentional infliction of mental suffering, . . . the invasion of [the] right of privacy, the denial of [the] right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, the alienation of the affections of a parent, . . . to name only a few instances, could not be fitted into any accepted classification when they first arose, but nevertheless have been held to be torts. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

PROSSER, supra, at 3-4.

136. *Smith*, 198 Cal. Rptr. at 836.

137. *Id.* at 836.

138. *Id.* at 837.

139. *Id.*

140. KOESEL ET AL., *supra* note 55, at 50.

141. *Id.* The states include: Alabama, Alaska, Florida, Idaho, Illinois Indiana, Kansas, Louisiana, Montana, New Mexico, New Jersey, and Ohio. *See*

on the basis of the conduct of the spoliator. Five jurisdictions have recognized an independent tort for intentional spoliation, while four jurisdictions provide tort relief even when the spoliator's behavior is simply negligent.[142] Within those two groups, the tort may further vary based on the relationship between the spoliator and the individual harmed.[143]

1. *Intentional Spoliation- First and Third Parties*

Courts that have acknowledged an independent cause of action for intentional spoliation, emphasize their justification on the inadequacies of the traditional remedies to compensate the harmed party.[144] While the California Court of Appeals did not expressly state the elements required to satisfy the newly created tort of intentional spoliation of evidence in *Smith*, they may be inferred as such: (1) the existence of a lawsuit or a potential lawsuit; (2) knowledge by the spoliator that the suit or potential suit exists; (3) intentional acts of the spoliator in an attempt to destroy or alter evidence that is relevant to the pending or potential suit; (4) the actual destruction or alteration of the relevant evidence; and (5) damages to the harmed party caused by the actions of the spoliator.[145] In an action under intentional spoliation, it is the intent to destroy destruction of the evidence, rather than the purpose for destroying the evidence that is controlling.[146]

Intentional torts for spoliation may differ depending on whether it is a third party or a party involved in the litigation that that destroys the evidence. Some jurisdictions limit intentional spoliation actions only to when the spoliation was done by the

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id. (citing cases that have established the tort).

142. *Id.* at 50-51. Those adopting intentional spoliation are: Alaska, Idaho, New Jersey, New Mexico, and Ohio, while those opting for negligent spoliation are: Florida, Montana, Alabama, and the District of Columbia (recognizing the tort based on negligence or recklessness). *Id.*

143. *See* Rivlin, *supra* note 25, at 1026-28 (discussing liability under independent torts for first and third parties to the underlying litigation).

144. KOESEL ET AL., *supra* note 55, at 52.

145. Joe Wetzel, *Spoiling an Illinois Personal Injury Plaintiff's Spoliation Claim for Routinely Maintained Items*, 28 S. ILL. U. L.J. 455, 459-60 (2004) (citing Shannon D. Hutchings, Note, *Tortious Liability For Spoliation of Evidence* 24 AM. J. TRIAL ADVOC. 381, 384).

146. *See id.* at 460. "A spoliator may destroy evidence without a subjective intent to avoid liability by discarding an item deemed unnecessary to keep." *Id.*

hands of a party to the underlying litigation. In *Smith* though, the spoliation was the result of action by a third person, not a party to the underlying litigation. Therefore, the traditional remedies would be ineffective in fully compensating the injured party.[147] However, if an independent tort for spoliation is recognized and applies even when a third party commits the spoliation, the victim of such behavior is provided with further protection that otherwise would not be available. Whether the cause of action is to extend beyond first parties or prospective first parties to third parties must be articulated by the state courts.[148] This decision will often depend on the policies used to support the court's recognition of the tort,[149] but in either circumstance, the recognition of tort relief enhances the victim's ability to be fully compensated for the wrong that occurred because of the spoliation.

For example, the damages awarded for the intentional tort for spoliation of evidence are similar to the economic damages that are recoverable when an action is brought for the negligent or intentional interference with a prospective economic advantage.[150] Along with the "probable expectancy" (which is the valuable interest in the underlying suit), compensatory and perhaps even punitive damages some of the remedies made available to the victim by suing on this tort.[151]

2. *Negligent Spoliation of Evidence*

While some jurisdictions, as described above, require intent to destroy the evidence as a prerequisite condition for a tort claim of spoliation, others simply require negligence on the part of the spoliator. In the latter jurisdictions, the required elements for a cause of action under the tort of negligent spoliation of evidence are gen-

147. *See* Maurice L. Kervin, *Spoliation of Evidence: Why Mississippi Should Adopt the Tort*, 63 MISS. L.J. 227, 240 (1993). In *Smith*, the plaintiff was injured when a wheel and tire from another vehicle crashed through her windshield. 198 Cal. Rptr. at 831. The vehicle that lost the tire was towed to a dealer who sold the vehicle, however, the dealer agreed to retain the tire, wheel and other evidence for examination by the plaintiff's experts. *Id.* Despite the agreement, the dealer lost or destroyed the evidence, and it was therefore impossible for the plaintiff to prove the cause of the accident; and the plaintiff filed suit against the dealer. *Id.*

148. Daerr-Barron, *supra* note 10, at § 1.

149. *Id.* at § 21.

150. *Id.* at § 28.

151. *Id.*

erally: (1) the existence of a potential civil action; (2) a duty to preserve relevant evidence to the potential civil action;[152] (3) the destruction of the evidence; (4) a significant impairment in the ability to prove the claim in the potential suit; (5) a causal relationship between the spoliation and the inability to prove the claim; and (6) damages suffered by the party alleging spoliation.[153]

Negligent spoliation usually arises in one of two situations. The first typical scenario involves a party who "unintentionally destroys or loses evidence which has a favorable effect on his position."[154] The second situation involves an independent third party who destroys, alters or loses evidence in the potential or pending suit.[155] Some states have acknowledged the theory of negligent spoliation under their traditional negligence laws, without directly stating that a new cause of action (an independent tort for spoliation of evidence) is being created.[156]

While negligent spoliation may seem more innocent than intentional spoliation, the results can be just as damaging to the injured party. The ability to prove a claim may be dependent upon the piece of evidence that was lost, or destroyed, albeit without any intent to do so. It is this very reason that some courts have recognized the separate cause of action for negligent spoliation.

B. *Criticisms of an Independent Tort*

Despite the added protections offered to victims of spoliation through the recognition of an independent tort for such behavior, recognition of any such a tort has not been without criticism. It has been argued that there are "common sense" alternatives to the spoliation tort.[157] However, "common sense" alternatives are noth-

152. The court's recognition of an independent tort for spoliation would create the necessary duty of care to preserve evidence. *See* Rivlin, *supra* note 25, at 1027-28.

153. KOESEL ET AL., *supra* note 55, at 55.

154. John K. Stipancich, *The Negligent Spoliation of Evidence: An Independent Tort Action May be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1140 (1992).

155. *Id.*

156. KOESEL ET AL., *supra* note 55, at 56. Koesel points to a case from Illinois where the court held that "an action for negligent spoliation can be stated under existing negligence law without creating a new tort." *Id.* (quoting Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (Ill. 1995).

157. *See* Judge, *supra* note 132. In suggesting that Wisconsin ought not to

ing more than the traditional remedies already in use.[158] The most commonly cited reasons states provide when rejecting the tort are "that current remedies adequately address spoliation problems, and that the tort would be all but unworkable in practice."[159] Specifically, it is claimed "that (1) a legal duty to preserve evidence unjustly interferes with property rights; (2) the alleged injury is too attenuated; and (3) the tort risks excessive and duplicative litigation."[160] Other courts that have refused to permit a cause of action have also criticized the tort for addition reasons such as: (1) there are a number of traditional remedies available; (2) when the spoliator is a nonparty, there is no duty to the harmed litigant; and (3) the destruction of evidence is reasonable given the particular facts and circumstances of the case.[161] However, these criticisms do not withstand scrutiny and should not prevent states from adopting laws recognizing a cause of action in tort against spoliators of evidence.

For example, the duty to preserve evidence is not absolute, and thus the fears that an independent tort would require "all individuals to constantly be on notice that their property could be needed in a lawsuit,"[162] is unfounded. Whether or not a person has a duty to preserve items of evidence is dependent on three main factors: (1) the relationship between the parties; (2) the "reasonable foreseeability" of the type of harm to the individual bringing the suit; and (3) the public policy promoted by recognizing an enforceable duty.[163] Depending on the extent such a duty is to be extended would be reflected in the court's recognition of the tort and the policies in support of such recognition.

Similarly, the speculative nature of the injury is not reason enough to abandon the tort. There are other areas of the law where injuries may be somewhat uncertain; however, this does not

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adopt any such independent spoliation tort, the comment, however, acknowledges that the traditional remedies – inferences, sanctions, and criminal prosecutions – have "their own unique problems that demand attention and reform." *Id.* at 443.

158. *See id.* at 462-70.
159. *Id.* at 450-51.
160. *Id.* at 451.
161. *See* Rivlin, *supra* note 25, at 1023.
162. Judge, *supra* note 132, at 451.
163. Ortega & Vogel, *supra* note 11, at 2.

act as a bar to providing proper relief.[164] Further, some argue against the tort on the grounds of preserving the concept of res judicata, and to avoid duplicate or excessive litigation. Those who criticize an independent tort action for spoliation argue that the tort would become a "second-chance sweepstakes for every party disgruntled with the outcome of a lawsuit."[165] Again, this interest must be balanced against the situations where the victim may never be able to have their claim properly litigated in the first place. If a party or non-party spoliates evidence, the spoliator should not be insulated from liability for her wrongdoing merely because one party has prevailed in the underlying litigation.

C. *The Appropriate Cause of Action for Rhode Island Courts*

The underlying question in determining whether or not to recognize an independent tort for spoliation, and if so, what type, is whether the existing rules, procedures, sanctions, and torts are sufficient to maintain the integrity of the court system.[166] Judicial integrity requires that relevant evidence be presented in the quest for truth and fairness in resolving civil actions.[167] In Rhode Island, the traditional spoliation remedies can be effective in upholding the integrity of the judicial system when properly applied in many situations. These situations involve spoliation that results from the conduct of a party-litigant. However, as seen, these traditional remedies are not always sufficient in dealing with first party litigants. Furthermore, when spoliation results from the conduct of a third party, either negligently or intentionally, the traditional remedies are in effective and threaten the absolute integrity of the state's judiciary. For this reason, the appropriate tort ought to recognize a cause of action for the intentional or negligent spoliation of evidence by first *or* third parties. It is well established that a third party property owner has a right to do what he may with

164. Some examples include (1) future earnings in personal injury and wrongful death suits, which are often uncertain, yet still recoverable; (2) patent or trademark infringement cases where damage awards are often substantial despite lack of proof of economic or emotional harm; and (3) tort action such as libel, slander, and invasion of privacy. *See* Rivlin, *supra* note 25, at 1030.

165. Judge, *supra* note 132, at 458.

166. *See* Ortega & Vogel, *supra* note 11.

167. *Id.*

his property, including dispose of or destroy the property.[168] The problem is that a litigant to an underlying civil action may be harmed by the third party's conduct.

To satisfy such a claim, the following elements would have to be met: (1) pending or *probable* litigation; (2) knowledge on the part of the defendant (in the spoliation suit) that litigation exists or is *probable*; (3) *willful* or *negligent* destruction of evidence by the defendant that disrupts the plaintiff's case; (4) a disruption in the plaintiff's case; (5) damages proximately caused by the defendant. The tort action may be brought against a first or third party, and may be brought at the same time as the underlying litigation. Recognition of such a cause of action with theses elements directly addresses the two underlying policies of deterrence and compensation. A victim of spoliation will not be barred from seeking redress due to the fact that the alleged spoliator is not a party to the underlying litigation. Similarly, anyone who acquires or posses evidence which they know is relevant to pending or probable litigation, will be deterred from any form of conduct (willful or negligent) related to the evidence that may disrupt the plaintiff's underlying litigation. However, this would not result in a landslide of litigation from plaintiffs who want a second bite at the apple by filing an independent spoliation action. The five required elements provide safeguards for the defendant in the tort action. In order for the plaintiff to recover, she must carry the burden of proving her claim against the tortfeasor. Failure to establish any of the five elements will result in a decision favoring the defendant. The proposed independent tort properly and equitably addresses the concerns and rights of all those potentially involved in an action brought under the newly established tort.

In Rhode Island, judicial recognition of an independent cause of action will require additional persuasion due to the Rhode Island Supreme Court's position articulated in *Ferreria v. Strack*[169] that, "[t]his Court has long held that the creation of new causes of action should be left to the Legislature."[170] While the Court's stance on new causes of action may appear to be well established,

168. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 787-90 (2005) (discussing the history and jurisprudence of the right to destroy one's property).

169. 652 A.2d 965 (R.I. 1995).

170. *Id.* at 968 (declining to create social host tort liability).

the reasoning applied in *Ferreria* is not applicable to a cause of action for spoliation of evidence. In *Ferreria*, the Rhode Island Supreme Court declined to create social host tort liability; in doing so it noted that, "[t]he majority of courts in other jurisdictions faced with the question of extending common-law tort liability to the social-host guest context have deferred to the Legislature. The reasoning for this deferral is their consideration is that the question raised is one of broad public policy rather than an interpretation of the common law."[171] The same cannot be said of the jurisdictions that have been faced with the question of recognizing a cause of action for the spoliation of evidence in civil matters. This issue is well established as one for the courts to decide because to date, there has been no attempt by the legislature of any state to overturn a decision of a court that has decided the matter either way.[172] Because the Rhode Island Supreme Court has not specifically stated that this is an issue for the legislature, and the overwhelming recognition that the issue is one belonging to the courts, the Rhode Island judiciary is not precluded from creating a new independent cause of action for spoliation. In fact, in fulfilling its duty to maintain justice, it *must* recognize such a claim.

VII. CONCLUSION

While the doctrine of spoliation as an independent tort is not perfect, it certainly addresses many of the policies that aim to deter such conduct and allow for more accurate and just proceeding in civil courts. By comparing the alternative remedies offered by independent causes of action against the effectiveness of the traditional remedies presently available in Rhode Island, it is obvious that a tort for the spoliation of evidence is warranted. The policies most advanced by an independent tort are that of deterrence, adequate compensation for the victim, and insuring a fair and just civil proceeding where claims can be heard with all the relevant evidence. Of the different permutations of the spoliation tort, those that allow such claims for intentional or negligent spoliation by a first or third party appear to be the most effective at furthering these policies. As time and technology advance, the courts ought to be aware of the alternative torts and recognize that they

171. *Id.*
172. Daerr-Bannon, *supra* note 10, at § 1.

may be more effective in meeting unanticipated challenges to preserve the integrity of the courts and to assure victims are compensated for their losses.

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* The Author would like to thank Professor Larry J. Ritchie for the insight, encouragement, and enthusiasm he contributed to this Comment, and for his shaman-like guidance and mentoring. Furthermore, the Author expresses his sincere gratitude to Alison for her invaluable support and continued inspiration.